

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
INDIAN HEAD ASSOCIATES	: DETERMINATION
	DTA NO. 813069
for Revision of a Determination or for Refund	:
of Real Estate Transfer Tax under Article 31 of	
the Tax Law.	:

Petitioner, Indian Head Associates, 1455 Veterans Memorial Highway, Hauppauge, New York 11778, by its representative, Stephan B. Gleich, Esq., has brought a motion dated February 8, 1995 for an order granting summary determination to petitioner. Based upon the affirmation dated February 8, 1995 of Mr. Gleich in support of the motion, the affirmation dated February 28, 1995 of Donald C. DeWitt, Esq., in opposition to the motion and in support of the Division of Taxation's ("Division") cross-motion for summary determination, and Mr. Gleich's reply affirmation dated March 23, 1995 and upon the pleadings and proceedings had herein, Frank W. Barrie, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division properly calculated the consideration given by petitioner for real property acquired in a foreclosure sale for purposes of computing petitioner's real estate transfer tax liability.

FINDINGS OF FACT

Petitioner, Indian Head Associates, a partnership, held a

second mortgage (on which the defaulting mortgagor owed \$4,635,193.10 as of May 31, 1993) that was secured by commercial/industrial property located in Kings Park, Town of Smithtown, Suffolk County.

Petitioner commenced an action to foreclose its mortgage, and a Judgment of Foreclosure was granted on October 6, 1993 ordering the sale of the subject Long Island property at public auction.

Petitioner was the highest bidder at the foreclosure sale held on January 5, 1994, purchasing the property for the sum of \$1,000,000.00. Petitioner acquired the property subject to a pre-existing first mortgage, held by an individual identified as Milton Siegel, with \$480,000.00 remaining due on an original principal of \$600,000.00.

The Judgment of Foreclosure granted on October 6, 1993 also decreed that:

"[Petitioner] may apply at the foot of this judgment, after sale, pursuant to the provisions of Section 1371 of the Real Property Actions and Proceedings Law for judgment against the defendants for such deficiency, if any, to which the Court shall deem the plaintiff to be entitled."

However, it does not appear that petitioner obtained a deficiency judgment for the remaining \$3,635,193.10 owed on the mortgage against the defaulting mortgagor.

Petitioner by its partner, Henry Taca, filed a Combined Real Property Transfer Gains Tax Affidavit and Real Estate Transfer Tax Return (Form TP-584) received by the Division on February 3, 1994 on which petitioner reported the conveyance of the subject Long Island property pursuant to the foreclosure

sale. Schedule E of Form TP-584 instructed the taxpayer to calculate the consideration subject to tax by adding "[t]he amount of foreclosure judgment or price bid by grantee, whichever is higher" to the amount of any pre-existing mortgage or lien. In accordance with this instruction, petitioner added the amount of the foreclosure judgment of \$4,635,193.10 to the amount of the pre-existing mortgage remaining on the property of \$480,000.00, arriving at a total of \$5,115,193.10. Petitioner paid real estate transfer tax of \$20,462.00 (\$2.00 for each \$500.00, or fractional part of consideration, i.e., $\$10,231.00 \times \$2.00 = \$20,462.00$).

Petitioner filed a real estate transfer tax claim for refund (Form TP-592.2) seeking a refund of \$14,540.77 based upon its contention that tax should be calculated on its bid of \$1,000,000.00, the approximate fair market value of the Long Island property, plus the amount of the pre-existing mortgage of \$480,000.00, which totals \$1,480,000.00. Real estate transfer tax of \$5,920.00 would be due on such reduced consideration of \$1,480,000.00 (\$2.00 for each \$500.00 or fractional part of such consideration, i.e., $\$2,960.00 \times \$2.00 = \$5,920.00$). Petitioner explained in its refund claim that:

"[t]he transfer tax on Indian Head's transfer should be based on the fair market value of the property at the time of the transfer, not on the totally unrelated value ascribed to the foreclosure judgment."

Petitioner pointed to the definition of "consideration" for real property gains tax purposes in support of its contention that the fair market value of the Long Island property should have been used.

The Division denied petitioner's claim for refund in a letter dated June 14, 1994, providing the following explanation:

"It is the New York State Department of Taxation and Finance's policy as reflected in the instructions [of the tax forms] that when real property is being conveyed pursuant to a mortgage foreclosure and the successful bidder is the mortgagee . . . the consideration is equal to the amount of judgment in foreclosure or the bid price, whichever is higher, plus the amount of any other pre-existing mortgages . . . remaining on the property after the conveyance.

"In addition . . . the definition of 'Consideration' applicable to [real property gains tax] does not apply to [real estate transfer tax]."

SUMMARY OF THE PARTIES' POSITIONS

Petitioner maintains that the Division's calculation of consideration ignores economic reality:

"The arbitrary amount of the uncollected or uncollectible debt that is cancelled or discharged by a successful foreclosure should not be the factor determining transfer tax consideration, but, as with all other arms-length real estate transactions, should be based on the fair market value of the property which is transferred" (Petitioner's brief, p. 9).

Petitioner points to Tax Law § 1440(1)(d)(i),¹ which limits "consideration" for purposes of the real property gains tax law to the fair market value of the real property in the case of a transfer resulting from a foreclosure action, in support of its position. In addition, petitioner cites an Advisory Opinion issued by the Commissioner of Taxation and Finance on December 28, 1992, which addresses the amount of consideration that should be allocated to real property upon the transfer of a controlling interest in an entity with an interest in real property for purposes of the real property transfer gains tax. This Advisory Opinion noted that fair market value was properly used in computing consideration for gains tax where a bank took control of real property by acquiring control of the entity that owned the property.

The Division counters that petitioner's "economic reality" argument "is no more than a request that the plain provisions of Article 31 be ignored" (paragraph 51 of attorney DeWitt's affirmation dated February 28, 1995). The Division also asserts

¹Tax Law § 1440(1)(d)(i) was added by Laws of 1993 (ch 57) and is applicable to transfers occurring on or after April 15, 1993.

that petitioner has not established the fair market value of the property as \$1,000,000.00.

CONCLUSIONS OF LAW

A. For purposes of the real estate transfer tax imposed by Tax Law § 1402, "conveyance" is broadly defined at Tax Law § 1401(e) to mean:

"[T]he transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by a receiver, or transfer or acquisition of a controlling interest in any entity with an interest in real property" (emphasis added).

Consequently, petitioner's acquisition of the Long Island property by mortgage foreclosure was properly subject to the real estate transfer tax (cf., Trefoil Capital Corp. v. Creed Taylor, Inc., 125 Misc 2d 152, 479 NYS2d 308).

B. Under Tax Law § 1402, the real estate transfer tax is imposed when the consideration for the real property conveyed exceeds \$100.00. Tax Law § 1401(d) defines "consideration", in relevant part, as follows:

"'Consideration' means the price actually paid or required to be paid for the real property . . . whether paid or required to be paid by money, property, or any other thing of value. It shall include the cancellation or discharge of an indebtedness or obligation. It shall also include the amount of any mortgage, purchase money mortgage, lien or other encumbrance, whether or not the underlying indebtedness is assumed or taken subject to" (emphasis added).

A plain reading of the statutory language emphasized above supports the Division's calculation of the consideration given by petitioner for the Long Island property acquired in the

foreclosure sale. As noted in Finding of Fact "4", there is no evidence that petitioner obtained a deficiency judgment for the remaining \$3,635,193.10 owed on the mortgage pursuant to RPAPL § 1371(1), which permits a plaintiff in a foreclosure action to apply for a deficiency judgment. Consequently, the amount of the indebtedness of the mortgagor to petitioner cancelled was \$4,635,193.10, and the Division correctly determined that the consideration subject to transfer tax was the amount of the judgment in foreclosure of \$4,635,193.10, plus the amount of the pre-existing mortgage of \$480,000.00, which totals \$5,115,193.10.

C. Petitioner's contention, that the definition of "consideration" for purposes of the real property gains tax under Article 31-B of the Tax Law, and an Advisory Opinion with regard to the calculation of consideration under Article 31-B are relevant to this matter, is without merit. Reliance on the definition of "consideration" for purposes of the real property gains tax law would render the definition of "consideration" for purposes of the real property transfer tax at issue here meaningless, and, in short, is irrelevant for the purpose of construing the term "consideration" under Tax Law § 1401(d) (cf., Morton Buildings v. Chu, 126 AD2d 828, 510 NYS2d 320, affd 70 NY2d 725, 519 NYS2d 643 [wherein the court noted that "(t)he rules of statutory construction require that every part of a statute must have a meaning"]).

D. The petition of Indian Head Associates is denied, and the denial dated June 14, 1994 of its claim for refund is

sustained.

DATED: Troy, New York
September 14, 1995

/s/ Frank W. Barrie

ADMINISTRATIVE LAW JUDGE